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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JAN 5 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)))	PR Docket No. 93-144 RM-8117, RM-8030, RM-8029
and		
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding 800 MHz SMR	)))	PP Docket No. 93-253

To: The Commission

COMMENTS

Robert Fetterman d/b/a R.F. Communications (Fetterman), by his attorneys, hereby submits his Comments in the above-captioned matter. Fetterman opposes the adoption of the proposals contained within the FNPRM. Insofar as Fetterman's Reply Comments to the matter from which this FNPRM was derived are relevant, those Reply Comments are hereby incorporated herein, see, attached.

Fetterman would like to voice his opposition to the Commission plan to divide the country along Metropolitan Trading Area lines and auction 200 of the currently-allotted SMR frequencies to the winning bidder. It is Fetterman's belief that such a

plan is impractical and unworkable, and if attempted, would injure the already established SMR industry.

Respectfully submitted,
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Dated: January 5, 1995

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

REPLY COMMENTS

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SUMMARY

Nextel's desire for parity with cellular and PCS operators, which Nextel belatedly claims are its prime competition, are without merit. Nextel's comparison to the reallocation of 2 GHz spectrum is not on point and fails to meet any test of rational regulation of the radio spectrum. Whereas PCS operators may slowly change out 2 GHz systems on a case-by-case basis, Nextel cannot provide such assurances for affected SMR operators.

Nextel's claim to parity must be evaluated in regard to the market it serves. Its market arises out of the operation of traditional SMR service. Parity, *i.e.*, fully equal regulatory treatment, would then require that Nextel first seek a separate spectrum allocation for the delivery of its service.

Nextel's qualifications to be a CMRS remains in doubt. Nextel has acted to allow too much foreign control of its business and/or has engaged in impermissible increases in its foreign ownership beyond the statutory date set by Congress. Nextel is not positioned to assume in its comments to this proceeding that CMRS status will be attained.

While Nextel adjusts and tunes and ultimately changes out its technology, the spectrum which it is warehousing in anticipation of its unproven demand will lie fallow. SMR operators who are producing a valuable service for the public will still be precluded from further growth while awaiting the end of Nextel's elongated construction deadline.

The Commission will bear the brunt of the licensing morass that will occur from enactment of the proposal, which Nextel claims will be less than that presently suffered by the Commission at the hands of speculators and application mills. Fetterman strongly doubts Nextel's claim considering that it is not supported by any showing of fact, evidence or process that would provide the claimed relief. Nextel proposes nothing of value to the Commission, to other SMR operators, to subscribers of SMR service and, perhaps, to itself. There exists no basis in law or logic for its proposals, which must be summarily rejected.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	

To: The Commission

REPLY COMMENTS

Robert Fetterman d/b/a RF Communications, by and through counsel, hereby files comments in reply within the above captioned rule making. Fetterman owns and operates numerous SMR facilities within the Commonwealth of Pennsylvania. Fetterman has been quite successful in his business and provides service to numerous end users which desire continued, unfettered operation of SMR facilities at a reasonable price. Accordingly, Fetterman's interest within the instant rule making is quite acute. The outcome of this proceeding may determine the quality, longevity and value of Fetterman's SMR business. Thus, Fetterman is qualified to make meaningful comment and to provide assistance to the Commission in arriving at its rules and regulations which are intended as an outcome of this proceeding. To those ends, Fetterman hereby requests that the Commission act within the public interest by rejecting those proposals forwarded by Nextel Communications, Inc. (Nextel) in its comments to this rule making.

Nextel claims two bases for its proposal, parity and operational need. The Commission is well positioned to reject both claims summarily as without factual basis or legal support. In support of his position that Nextel has failed to provide a basis in fact or in law for its proposals, Fetterman shows the following.

The Issue of Parity

Nextel's desire for parity with cellular and PCS operators, which Nextel belatedly claims are its prime competition, are without merit. Neither cellular service nor PCS service have been (or will be) brought to the public via a reallocation scheme with such a devastating impact on existing licensees and users. Nextel's comparison to the reallocation of 2 GHz spectrum is not on point and fails to meet any test of rational regulation of the radio spectrum. Specifically, the reallocation of the 2 GHz band would not require the retuning or replacement of millions of mobile units. Standing alone, this fact demonstrates a cognizable difference between the Commission's action reallocating spectrum for PCS use and that which Nextel proposes.

Whereas PCS operators may slowly change out 2 GHz systems on a case-by-case basis, Nextel cannot provide such assurances for affected SMR operators. For example, if Nextel desired the displacement of one operator, the change of that operator's frequency might effect co-channel users and short-spaced users. The ripple effect cannot even be quantified with certainty without extensive analysis.

The same ripple effect would cause relicensing and administrative nightmares for both users and the Commission. It is, therefore, apparent that Nextel's comparisons between its request and the earlier PCS accommodation are far from parallel.

Of a more disturbing nature, however, is Nextel's statement that it is no longer an SMR. In effect, it finds itself more akin to a cellular or PCS provider. Such characterization is belied by the nature of its licensing. The Commission has not suddenly provided Nextel grants of authority under Part 22 of its rules. Accordingly, its underlying premise that it no longer provides SMR service and should, therefore, no longer be subject to the same rules, is incorrect. The Commission need look no further than Nextel's own records to discover what type of service Nextel provides. Fetterman strongly suspects that if the Commission were to question the 5,000 ESMR users which Nextel now claims it serves, it would discover that few, if any, were lured to ESMR from a cellular service. Instead, Nextel's own customer base would demonstrate that its customers are, in fact, former SMR end users.

Therefore, Nextel's claim to parity must be evaluated with regard to the market it serves. Its market arises out of the operation of traditional SMR service. Its customers are drawn from that pool. Its primary competition arises out of analog SMR operations. Nextel is, therefore, singularly an SMR operator and may

demand no greater privilege or right than those offered by the Commission for operation of an SMR facility.

Assuming, *arguendo*, that Nextel's claim is correct, that it has achieved a status which is beyond SMR operation, its demand for parity must still fail. Parity, *i.e.*, fully equal regulatory treatment, would then require that Nextel first seek a separate spectrum allocation for the delivery of its service. Nextel will note that neither PCS nor cellular was overlaid atop existing services. PCS's intended use of the 2 GHz band is ancillary to its primary spectrum allocation. Accordingly, Nextel's request is not, in fact, a request for parity. It is a request for something new and abusive to the marketplace which was neither requested nor required in the past.

A Question Of Eligibility

When Nextel speaks of parity, its claim rests on its status as a CMRS, following the recent actions of Congress in creating this new designation. See, the Omnibus Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, §6002(c)(2)(B) *et seq.* However, Nextel's qualifications to be a CMRS remains in doubt. As the Commission is aware, Nextel's qualifications have been challenged in an action taken by Kevin Lausman of Florida. Mr. Lausman have contended that Nextel has acted to allow too much foreign control of its business and/or has engaged in impermissible increases in its foreign ownership beyond the statutory date set by

Congress. Nextel has steadfastly denied these contentions, but has failed within the context of that proceeding to demonstrate how its actions are in accord with the statutory requirements.[1]

It may well come to pass that Nextel will not achieve CMRS status, therefore, Nextel is not positioned to assume in its comments to this proceeding that such status will be attained. It is, therefore, incumbent on the Commission to determine with finality the claims made within that proceeding prior to entertaining any further requests from Nextel which rely on its continued ability to operate ESMR facilities.

Other questions also exist regarding the operation of Nextel's business, including an ongoing investigation by the U.S. Department of Justice to determine whether Nextel's actions are in violation of antitrust laws. Given the nature of Nextel's request which would permit Nextel to dominate major markets and which would retard competition within those markets, it would be prudent for the Commission to await the final outcome of that investigation prior to its ruling in favor of Nextel.

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[1] See, In the Matter of Nextel Communications, Inc., Commercial Mobile Radio Service Foreign Ownership Petition, Opposition filed by Kevin Lausman (Dated March 11, 1994) wherein Lausman noted that Nextel's ownership and control was in violation of the newly amended Communications Act of 1934, as amended, at 47 U.S.C. §332(c)(6), citing among other issues, Nextel's excess foreign control and impermissible increase in foreign ownership beyond the date for such increases.

The Commission must also explore the contradictions between Nextel's proposals and 47 U.S.C. § 309(j). By Fetterman's analysis, it appears that the reallocation scheme proffered by Nextel would create a circumstance of mutual exclusivity between applicants for newly allocated spectrum. If this is, in fact, the case, then the issuance of authority would require the holding of an auction to determine the eventual licensee. Nextel's comments do not address this possibility. Rather, those comments assume that the Commission will engage in a 200-channel give away to the few, eligible operators of ESMR systems within certain MTAs. Fetterman can only assume that the parity requested by Nextel is more akin to the great HDTV spectrum give away,[2] rather than the reality under which land mobile licensees must operate.

By the foregoing, the Commission is made aware of the fact that there is no easy or simple path charted by Nextel in meeting its requirements. In fact, much of what Nextel is requesting might, by action of law, not be deliverable to Nextel. The uncertainty created by these relevant, concurrent proceedings cut directly against any favorable action by the Commission on behalf of Nextel. Fetterman, therefore, respectfully suggests that the Commission reject Nextel's proposals until Nextel can demonstrate whether even it might benefit by grant of such sweeping changes.

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[2] If Nextel depends on the Commission's actions in allocating HDTV spectrum, Nextel might note that broadcast licensees are immune to auction processes, thereby providing the legal basis for such action.

Nextel's Broken Promises

Perhaps the Commission need only remember its earlier determinations regarding the operation of ESMR facilities for it to conclude it has adequate reason to deny Nextel's proposals. Fetterman specifically refers to the following statements contained with the Commission's Memorandum Opinion and Order (MO&O), granting Fleet Call, Inc.'s request for waiver:

> providing Fleet Call blanket protection from new co-channel licensees is not necessary to the implementation of its proposal. Our analysis shows that the current operating environment in these markets already provides Fleet Call with much of the protection it requires from new applicants. That is, the co-channel protection that is afforded all SMR licensees in these areas, including Fleet Call, essentially precludes the assignment of new stations. We therefore see no reason to place a formal restriction against new co-channel applications in Fleet Call's intended service areas,

Memorandum Opinion and Order in File No. LMK-90036, 6 FCC Rcd. 1533 at para. 17, recon. denied, 6 FCC Rcd. 6989 (1991). The Commission's determinations made therein were in direct response to the detailed technical showings made by Nextel (then Fleet Call, Inc.) in support of its request. In other words, Nextel's showings did not support or require the protection it seeks now. Had such protection been requested within that matter, there is at least a degree of likelihood that Fleet Call's request would have been denied and the thing now known as ESMR would not have existed in the marketplace. Or, more likely, an ESMR system would have been created which did not exhibit the vulnerability of Nextel's system.

Contrary to a long line of precedents, Nextel expects to receive now what it likely knew its system required from the outset. Case law clearly shows that an operator is not entitled to any assurance of success, that the Commission will not dictate the specific equipment to be employed by an operator, and that if an operator fails by its own hand, the Commission cannot, and will not, leap to its assistance based on nothing more than the operator's failed expectations.

At this juncture, the Commission has before it a request by Nextel to save it from itself. Nextel has raised enormous sums to construct a system which, by its own admission, may not work well in the marketplace. It has chosen to spend its funds on trying to convince the Commission of the worthiness of saving its vaunted technology, which now appears far too fragile, rather than seeking a technical solution. And rather than continuing its natural course of applying for spectrum or purchasing systems, Nextel now believes that it is entitled to receive a spectrum grant to the tune of 200 channels per market, based on no more than the puffery which has driven it into this sorry state.

If, as Nextel suggests, its system cannot be made to work as promised, so much the pity. While Nextel adjusts and tunes and ultimately changes out its technology, the spectrum which it is warehousing in anticipation of its unproven demand will lie fallow. SMR operators who are producing a valuable service for the public will still be precluded from further growth while awaiting the end of

Nextel's elongated construction deadline. Given the delay which must be the result of its problems, perhaps the time would be well spent by the Commission's investigation of Nextel and its previous claims, to determine whether Nextel has dealt in full candor with the Commission. The Commission may discover that Nextel knew that its system design would not operate as promised and urged the Commission further nonetheless.

A Little Perspective Is Required

One must presume that Nextel is serious in its comments and truly believes that its efforts to date qualify it for additional preferential treatment as compared to other SMR operators. However, the context and the content of Nextel's proposal are so fantastic on its face, that it leaves the reader a bit dazed. The nexus of the comments is that Nextel is entitled to receive up to 200 channels of spectrum, to be acquired within major markets, either by a blanket grant of authority or by engaging in frequency exchanges with existing operators and their customers. All of this is by virtue of the fact that, to date, Nextel has failed to live up to its promises to the Commission, share holders and end users. In exchange for this phenomenal windfall, Nextel is willing to pay some paltry amount to existing SMR operators for a few pieces of equipment and a handful of crystals.

The Commission will bear the brunt of the licensing morass that will occur from enactment of the proposal, which Nextel claims will be less than that

presently suffered by the Commission at the hands of speculators and application mills. Fetterman strongly doubts Nextel's claim considering that it is not supported by any showing of fact, evidence or process that would provide the claimed relief.

Regardless of whether Nextel's plan will result in "less" of a burden than that already placed on the Commission by application mills and speculators,[3] the Commission will still have to deal with and process all the applications which have come to it and which will come to it. Nextel implies that, once the Commission waves its magic wand and grants Nextel's proposal, all of the applications in the Gettysburg backlog[4] will disappear. One must wonder whether this is naivete or a subtle attempt to seduce the Commission with visions of empty desks and less harried workers. Nextel, a long time player in the field, ought to know that the applicants' Ashbacker rights would be totally steamrolled by such a scenario. Law and logic do not support such a fantasy and, if attempted by the Commission, it is certain that the Court of Appeals will not support it.

Nor would the Commission need Nextel's assistance in stopping the flood of speculative applications received by the Commission from application mills. The Commission need do no more than enforce its rules and the existing case law which

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[3] Thus far, Nextel can be counted among that number of speculators, possibly even first among equals.

[4] To date, 280+ days and rising.

preclude the preparation or filing of applications by any person who is not the applicant or its legal representative. That this issue has not been effectively handled by the Commission is unfortunate, but still, the Commission is fully capable of taking the steps necessary to protect itself if it has the will to so act.

In sum, Nextel proposes nothing of value to the Commission, to other SMR operators, to subscribers of SMR service and, perhaps, to itself. There exists no basis in law or logic for its proposals, which must be summarily rejected.

Conclusion

For the foregoing reasons, Fetterman respectfully requests rejection of Nextel's proposals by the Commission.

Respectfully submitted,
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Dated: July 11, 1994

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I, Nakia M. Marks, hereby certify that on this 11th day of July, 1994, I caused a copy of the attached Reply Comments to be served by hand delivery or first-class mail, postage prepaid to the following:

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